No. 20,106

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GREAT WESTERN BROADCASTING CORPORATION,
d/b/a KXTV, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Supplemental Petition to Review Supplemental Decision of the National Labor Relations Board

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REPLY BRIEF FOR PETITIONER

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AUTHORITIES CITED

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1. The Board's brief prompts petitioner to the conclusion that the pertinent language of the Supreme Court's decision in *Servette* (377 U.S. 46), relating to the publicity proviso, should be set forth verbatim herein in order to allow the Court properly to evaluate in context the meaning to be attached to the words used by the Supreme Court in that case. In petitioner's view, the Board has miscon-

strued the Supreme Court's meaning. The Supreme Court's statements (*ibid.*, at pp. 54-56), *in toto,* are as follows:

> "[9] We turn finally to the question whether the proviso to amended § 8(b)(4) protected the Local's handbilling. [55] The Court of Appeals, following its decision in Great Western Broadcasting Corp. v. Labor Board, 310 F. 2d 591 (C.A. 9th Cir.), held that the proviso did not protect the Local's conduct because, as a distributor, Servette was not directly involved in the physical process of creating the products, and thus 'does not produce any products.' The Board on the other hand followed its ruling in Lohman Sales Co., 132 N.L.R.B. 901, that products 'produced by an employer' included products distributed, as here, by a wholesaler with whom the primary dispute exists. We agree with the Board. The proviso was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded. We elaborated the history of the proviso in National Labor Relations Board v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 84 S. Ct. 1063. It would fall far short of achieving this basic purpose if the proviso applied only in situations where the union's labor dispute is with the manufacturer or processor. Moreover, a primary target of the 1959 amendments was the secondary boycotts conducted by the Teamsters Union, which ordinarily represents employees not of manufacturers, but of motor carriers. There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress.
>
> "The term 'produced' in other labor laws was not unfamiliar to Congress. Under the Fair Labor Standards Act, the term is defined as 'produced, manufactured, mined, handled, or in any other manner worked on * * *,' [56] 29 U.S.C. § 203(j), and has always been held to apply to the wholesale distribution of goods. The term 'production' in the War Labor Disputes Act

> has been similarly applied to a general retail department and mail-order business. The Court of Appeals' restrictive reading of 'producer' was prompted in part by the language of § 8(b)(4)(B), which names as a proscribed object of the conduct defined in subsections (i) and (ii) 'forcing or requiring any person to cease * * * dealing in the products of any other *producer, processor,* or *manufacturer.*' (Italics supplied.) In its decision in Great Western Broadcasting Corp. v. Labor Board, supra, the Court of Appeals reasoned that since a 'processor' and a 'manufacturer' are engaged in the physical creation of goods, the word 'producer' must be read as limited to one who performs similar functions. On the contrary, we think that 'producer' must be given a broader reach, else it is rendered virtually superfluous." (footnotes omitted.)

In the first place, the Board (Br., p. 14) lifts out of context the Supreme Court's statement, "We agree with the Board" (377 U.S., p. 55), thereby creating the impression that the Supreme Court had in *Servette* rejected this Court's conclusion that the advertising services of a television station did not make the station a producer of the advertiser's products. To the contrary, all the Supreme Court agreed with there was the Board's conclusion "that products produced by an employer included products distributed, as here [in that case], by a wholesaler" (*ibid.*). Nothing therein suggests that the Supreme Court was there holding that a television station, by advertising, helped "produce" the products it advertised.

The Board (Br., pp. 14-15) next lifts out of context the Supreme Court's *dictum* (377 U.S., p. 55) that—

> "There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress."

This statement of the Supreme Court is sandwiched between the statement that "a primary target" of the 1959

amendments of the Act was the boycott activities of the Teamsters Union, "which ordinarily represents employees not of manufacturers, but of motor carriers", and the Court's citation of other statutes to establish that the terms "produced" and "production" embrace "handled, or in any manner worked on" and have been applied to "wholesale" and "retail" "distribution of goods" (*supra*, pp. 2-3).

Read in the foregoing context of its holding that Congress must have intended a wholesale or retail distributor to be regarded as a "producer" of the products he distributes, the Supreme Court's dictum that the "protection of the proviso was [not] intended to be any narrower in coverage than the prohibition to which it is an exception" (*supra*) plainly is inapplicable here. The "prohibition" to which the publicity proviso is an "exception" is that part of Section 8(b)(4)(B) (see 377 U.S., p. 56; *supra*, p. 3) which prohibits certain conduct for "an object" of "forcing or requiring any person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer". As so limited, petitioner does not here question the Supreme Court's dictum.

However, as stated, in petitioner's main brief (pp. 13-14), the Supreme Court in *Servette* in no respect suggested, even by implication, that a television station, or any other advertising medium, was a producer of the products advertised through its facilities. It produces its own products, its programs (Main Br., p. 10).

Moreover, the "prohibition" of the statute under which petitioner claimed relief is that which proscribes conduct of the nature here involved for "an object" of "forcing or requiring any person * * * to cease doing business with any other person" (Main Br., p. 4, fn. 8). Petitioner's charges and the General Counsel's Complaint all claimed relief under this prohibition of the Act (see O. R. 26, 4, 8,

14). The publicity proviso plainly is not an "exception" to the "doing business" "prohibition", unless by chance the "doing business" involves the distribution of a "product" "produced" by the "primary" employer (Pet. Br., pp. 4-5, fn. 8).

The fact that, after proscribing certain conduct for "an object" of "forcing or requiring any person to cease using," etc., "the products of any other producer, processor, or manufacturer", Congress also found it necessary to prohibit such conduct for the purpose of "forcing or requiring any person * * * to cease doing business with any other person" (*supra*) fully discloses Congressional recognition that all secondary boycotts *do not* involve products of producers.

When the boycott does not involve a product of a producer, it is clear that Congress did not intend the proviso to be applicable. Had Congress intended the proviso to be applicable also to the "cease doing business" prohibition the proviso would have expressly so stated. Even better, Congress, if this were its intent as the Board here seems to argue, could have excluded from the prohibition of Section 8(b)(4)(B) *all* "publicity, other than picketing" which does not induce a secondary work stoppage in much simpler language than that contained in the proviso as enacted; for example, as follows:

> "* * * That for the purposes of this paragraph (4) only, nothing contained in this paragraph shall be construed to prohibit publicity, other than picketing, for an object proscribed in clause (B) thereof, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver or transport any goods, or not to perform any services, at the establishment of a secondary employer."

Compare this all-encompassing language with the restricted proviso Congress, in fact, adopted.

Thus, contrary to the position of the Board, it is clear (1) that Congress recognized and prohibited two types of secondary boycotts, namely, (a) those directed at "products" of a "producer, processor, or manufacturer", and (b) those directed at business relations which did not involve "products" of "a producer, processor, or manufacturer"; (2) that the publicity proviso is an exception only to the prohibition against secondary boycotts directed at "products" of a "producer, processor, or manufacturer"; (3) that the products of advertising media are not the products which are advertised through their facilities, but they are their own products—in the case of newspaper and magazine publishers, the newspapers and magazines themselves; in the case of television and radio stations, the programs televised and broadcast to customers and the public—which products are capable of being boycotted with impunity under the proviso (Main Br., pp. 9-10—the Board has offered nothing which would explain away this obvious flaw in its reasoning to the result it reached in this matter);[1] (4) that all the Supreme Court meant in *Servette* was that the proviso was not "intended to be any narrower in coverage than the prohibition" against secondary boycotts of "products of any other producer, processor, or manufacturer"; (5) that a television station, unlike a wholesaler, has not "handled, or in any other manner worked on" the products of its advertisers enroute to the market place; and (6) that the Supreme Court in *Servette* held merely that "'producer' must be given a broader reach" than manufacturer" and encompass an employer, like a wholesaler, who has "handled" the product on the way to the place where it is being distributed (*supra,* p. 2).

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[1] The Board's brief in the instant review proceeding (p. 12) states that "the question is whether a television station, like KXTV, in performing an advertising service, can be deemed to be the 'producer' of a 'product or products.'" This begs the question. Of course, it is a producer of a product or products. But the product it produces is the program it puts together and sends out over its assigned wave-length or channel, not the product of someone else who utilizes its programs and their transmission to advertise its own products.

2. The argument of the Board (Br., pp. 15-16) that, because Section 8(b)(4)(B) prohibits secondary boycotts by "means other than publicity" against a radio or television station, "it would follow that, where the means specified in the proviso are utilized, *the proviso privileges the secondary activity irrespective of the function performed by the primary employer*" (emphasis added), is contrary to reason and to the Supreme Court's holding in *Servette.* Simply because secondary boycotts against such stations by "means other than publicity" are clearly unlawful, it does not mean that all secondary boycotts against such stations conducted by "publicity" are privileged under the proviso "irrespective of the function performed" by the station. The Supreme Court in *Servette* made extremely clear that in order for the proviso to apply the function of the primary employer had to be that of a "producer" of the product, and encompassed within that term only those who have physical contact with the product by handling or in some manner working on it (*supra,* pp. 2-3).

3. The untenable position of the Board in this matter is further illustrated by its claim before this Court (Bd. Br., pp. 17-18) that, under the Supreme Court's decision in *Servette,* the publicity proviso permits a union to backtrack from the wholesaler, or distributor, to the manufacturer. In other words, the Board contends before this Court, in effect, that a union which has a dispute with a *distributor* of a product in one isolated community could, under the proviso, pursue the *manufacturer* of that product to the hundreds, or thousands, of outlets it has all over the country and boycott, not the few products of that *manufacturer* "handled" by the *struck distributor,* but the products of the *manufacturer* "handled" by its hundreds, or thousands, of *other distributors* throughout the country.

Servette did not so hold (*supra,* pp. 2-3). It held merely that "products 'produced by an employer' included products distributed, as here [in that case], by a whole-

saler'' (*supra,* p. 2), relying for this holding on definitions which state that ''produced'' includes ''handled, or in any other manner worked on.'' But the only portion of a manufacturer's product ''handled'', etc., by a wholesaler is that portion which passes through his hands on the way to the customer. Under *Servette,* this portion of the manufacturer's product is the only portion which may be boycotted with impunity under the proviso.

The Board cites no case supporting its position here, and petitioner knows of none. In fact, petitioner, in its main brief (p. 10), in this connection called this Court's attention to footnote 7 in the *Tree Fruits* decision (337 U.S., at p. 64) which states—

> ''The distinction between picketing a secondary employer merely to 'follow the struck goods,' and picketing designed to result in a generalized loss of patronage, was well established in the state cases by 1940. The distinction was sometimes justified on the ground that the secondary employer, who was presumed to receive a competitive benefit from the primary employer's nonunion, and hence lower, wage scales, was in 'unity of interest' with the primary employer, Goldfinger v. Feintuch, 276 N.Y. 281, 286, 11 N.E. 2d 910, 913, 116 A.L.R. 477; Newark Ladder & Bracket Sales Co. v. Furniture Workers Union Local 66, 125 N.J. Eq. 99, 4 A. 2d 49; Johnson v. Milk Drivers & Dairy Employees Union, Local 854, 195 So. 791 (Ct. App. La.), and sometimes on the ground that picketing restricted to the primary employer's product is 'a primary boycott against the merchandise.' Chiate v. United Cannery Agricultural Packing & Allied Workers of America, 2 CCH Lab. Cas. 125, 126 (Cal. Super. Ct.). See I Teller, Labor Disputes and Collective Bargaining § 123 (1940).''

This footnote plainly is inconsistent with the contention of the Board here. ''Follow'', certainly does not mean ''back-track''. Goods become ''struck'' only after they are in the hands of the ''struck'' employer. The ''competitive benefit from the primary employer's nonunion, and hence

lower wage scales'' can be obtained only by a ''secondary employer'' who receives the goods *after* they have left the hands of the primary employer.

There is nothing in the legislative history on the proviso which remotely suggests that the legislators desired to do more than protect the traditional *following* of ''struck goods'' referred to in the above quoted footnote from the *Tree Fruits* case. See, for example, the report of Senator Kennedy, spokesman for the Senate conferees, to the Senate on the proviso. *Legisl. Hist. of the Labor-Management Reporting and Disclosure Act of 1959,* vol. II, p. 1432 (1).

What the Board in this respect seems to be claiming is that a wholesaler who ''handled'' as little as one-thousandth of one percent of the products of a manufacturer became the ''producer'' of all the manufacturer's products. Necessarily, the Board also is saying that the proviso privileges the union having a dispute with *any* employer who ''handled'' the manufactured product to back-track and induce customer boycotts of the *ingredients* of the manufactured product from the point of origin of each ingredient through each stage of processing regardless of the number of employers through whose hands the ingredients may pass before being ''handled'' in manufactured form by the *primary* employer in the labor dispute. But neither of these claims is any more startling than the Board's contention, in its original decision and its Supplemental Decision, which latter is here under review, that a television station by advertising ''automobiles, bread, gasoline and beer'', and ''banking and cleaning services'', becomes a ''producer'' of these items.

4. The Board in its brief (pp. 19-20, fn. 17) refers to a number of decisions under the Fair Labor Standards Act. But, as the Board itself apparently recognizes (*ibid.*), these decisions are wholly irrelevant to the issue here. Those cases interpret an express provision of the FLSA (Sec.

3(j); 29 U.S.C. Sec. 203(j)) making the requirements of the FLSA applicable to "employees" engaged in work necessary to the production of goods for commerce. What is at issue here, however, is whether a television station is a "producer" of the products advertised over its facilities. Moreover, while television advertising may be necessary to the *production of customers for goods* produced, it clearly is *not necessary* to the *production of the goods* themselves. A reading of the cited decisions makes clear their inapplicability in the instant matter.

5. The brief of the Unions, *amici curiae* (pp. 5-9), relies exclusively on the Supreme Court's decision in *Tree Fruits* (377 U.S. 58) for the contentions (1) that "peaceful handbilling is beyond the pale" of the Section 8(b)(4) mandate against "threaten, coerce, or restrain" (Br., p. 7), and (2) that a restraint of handbilling in the instant matter would be an abridgement of "the constitutional right of free speech" (Br., pp. 8-9). Neither of these contentions is supported by the *Tree Fruits* or any other decision.

In respect to the Unions' first contention, the *Tree Fruits* decision holds merely that the proviso excludes from the ban of "threaten, coerce, or restrain" "picketing which only persuades [the secondary employer's] customers not to buy the struck product" (377 U.S., p. 70) because, "if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally" (377 U.S., p. 72, 63). As to "publicity other than picketing", the Court held that the "Senate conferees' doubts led Congress", in the proviso, to "authorize publicity other than picketing which persuades the customers of a secondary employer to stop all trading with him" (377 U.S., p. 72). *But this means,* under the *Tree Fruits* decision, *to "refrain*

from trading with a retailer who sells [nonunion or struck] goods'' (377 U.S., p. 70). The Court did not hold that handbilling was not ''coercive''. To the contrary, the Court particularly stated that the ''proviso'' provided safeguards for ''conduct which might be 'coercive' '' (377 U.S., p. 69).

It is thus plain that in *Tree Fruits* all the Supreme Court stated was that a Union could handbill a secondary employer dealing in a ''struck product'' to persuade customers to cease doing business with him at all because that was the way the Court read the exception to ''threaten, coerce, or restrain'' contained in the proviso in respect to ''products . . . produced'' by a struck employer.[2] The Court did not hold that handbilling is ''beyond the pale'' of Section 8(b)(4) because not within the proscription of ''threaten, coerce, or restrain''.

As the Supreme Court noted in *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694 (Main Br., pp. 18-19), in construing words like ''threaten, coerce, and restrain''—there, ''induce and encourage''—it is ''the end sought'' not the ''means used'' that is determinative (at p. 702). Applying that principle in *Tree Fruits* (see 377 U.S., p. 68), the Court held that publicity [there picketing] to persuade ''customers to cease buying the product of the primary employer'' is not within the ban of ''threaten, coerce, and restrain'' because, ''if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product'' (377 U.S., at p. 72). However, as the Court went on to hold—

> ''. . . when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow

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[2] Here, of course, this Court has held that petitioner is not the producer of its advertisers' products and the proviso, therefore, is inapplicable.

the struck product;[3] it creates a separate dispute with the secondary employer."

As the Court in *Tree Fruits* had previously noted (377 U.S., pp. 68, 63), the "isolated evil" Congress was concerned with in Section 8(b)(4)(B) was the prohibition of "coercive * * * conduct, whether it be picketing or otherwise", "to cut off the business of a secondary employer as a means of forcing him to stop doing business with the primary employer".[4]

The "pressure" to "persuade customers not to trade at all with the secondary employer" may as readily be accomplished by handbills or word of mouth, as here,[5] as by peaceful picketing. As the Supreme Court in *Tree Fruits* stated (377 U.S., p. 68), "the prohibition of § 8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise".

Having found in its Supplemental Decision (S.R. 86) that the Unions' "activities were directed towards the institution of a consumer boycott of all products distributed by the companies it listed as advertising on KXTV", the Board properly found further, under *Tree Fruits*, that the Unions' "conduct clearly constitutes threats, restraint, or coercion within the meaning of Section 8(b)(4)(ii) of the Act".

The Unions' second contention, that a restraint of handbilling in the instant matter would, under *Tree Fruits*, un-

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[3] Note again the Supreme Court's reference in *Tree Fruits* to "follow" and "struck product" (see supra, pp. 8-9).

[4] The Unions' apparent argument (Br., p. 7) that *Tree Fruits* means that there must be "evidence in legislative history of an intent to ban *specific conduct* as one of the 'isolated evils' " (emphasis added), misinterprets the Supreme Court's decision. In *Tree Fruits*, all the Court held was that before picketing or other forms of free speech only could be enjoined it must appear that it was for the " 'isolated evil' believed [by Congress] to require proscription" (377 U.S., p. 63).

[5] As this Court noted in its original decision herein (Main Br., p. 25), "one KXTV advertiser was subjected to a secondary boycott and at least two other advertisers ceased doing business with that station".

constitutionally abridge free speech, is likewise without substance.

The Unions' brief, without pointing to any specific justification therefor in *Tree Fruits,* suggests (pp. 8-9) that there is a constitutional difference between "peaceful picketing" and "peaceful handbilling" which makes the former "more amenable to legislative restraint than" the latter. However, as petitioner reads the *Tree Fruits* case, the Court made no distinction between the two. Thus, at one point the Court noted the argument that the "public will * * * neither read the [picket] signs and *handbills*" * * * (377 U.S., p. 71; emphasis added). At another point it expressly stated that "the prohibition of § 8(b)(4) is keyed to the coercive nature of the conduct, *whether it be picketing or otherwise*" (377 U.S., p. 68; emphasis added). The "coercive nature of the conduct" was repeatedly identified in the decision, in substance, as "conduct" "to persuade the customers of a secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer" (377 U.S., pp. 63, 68, 70-71, 72).

Thus, the Supreme Court necessarily having found in *Tree Fruits* that picketing to persuade customers of a secondary employer to cease all trade with him to force him to discontinue handling the products of the primary employer is a constitutional exercise of the Congressional power, and the Court having therein drawn no distinction between the Congressional power in respect to picketing and other forms of speech, or suggested a reversal of its prior decisions cited by petitioner (Main Br., pp. 16-19), it follows that the handbilling here for an object proscribed in *Tree Fruits* also is within the Congressional authority.

If this were not so, petitioner would have great difficulty in understanding the need for the Supreme Court's decision in Servette, relating to handbills, issued the same day as Tree Fruits. Nor can petitioner understand the need for the Servette decision if "handbilling" is not within the proscription of "threaten, coerce, or restrain"—the Unions' first contention.

CONCLUSION

Wherefore, it is clear that the Board and the Unions have shown no reason why this Court should not here reaffirm its holding on the facts of this case in the original review proceeding (No. 17,698) and grant the relief requested in petitioner's main brief (pp. 19-20).

Respectfully submitted,

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Certification

I certify that, in connection with the preparation of this reply brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing reply brief is in full compliance with those rules.

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